Supreme Court, U.S.
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No. 06-610

IN THE

Supreme Court of the United States

JAMAL MOORANI,

Petitioner,

v.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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Petitioner submits this Supplemental Brief pursuant to Supreme Court Rule 15(8) to address the effect of this Court's denial of certiorari in *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), *cert. denied*, 75 U.S.L.W. 3207 (No. 06-477) (March 23, 2007), on this petition.

Both *Banda-Ortiz* and this case arise out of the United States Court of Appeals for the Fifth Circuit; and the Fifth Circuit's published decision in *Banda-Ortiz* was the predicate for its unpublished decision in this case. The petition in *Banda-Ortiz* raised the same question as the question presented in this case that currently divides the courts of appeals—whether a motion to reopen proceedings before the Board of Immigration Appeals ("BIA") automatically tolls the running of a previously-established voluntary-departure period.

In his certiorari petition, Banda-Ortiz showed that the courts of appeals are split on this question, *Banda-Ortiz* Pet. at 7-11, explained that the question presented is important, recurring, and affects a substantial number of aliens, *id.* at 11-17, and illustrated why the Fifth Circuit's no-tolling position is inconsistent with the statutory scheme, *id.* at 18-28. The Government filed a Brief for Respondent, acknowledging the split in the circuits. *Banda-Ortiz* Resp. at 10. However, as the Government urged and as was acknowledged by Banda-Ortiz in his Reply, *Banda-Ortiz* was not a proper vehicle to resolve the split: Banda-Ortiz's motion to reopen was granted by the BIA while his petition for certiorari was pending, and thus his case became moot. *Banda-Ortiz* Resp. at 10; *Banda-Ortiz* Reply at 1-2. Both parties agreed that, therefore, Banda-Ortiz's petition for certiorari should be denied. *Id.* The Government, however, also suggested that, in the alternative, the Court could have "grant[ed] the petition, vacate[d] the court of appeals' judgment, and remand[ed] the case with instructions to dismiss." *Banda-Ortiz* Resp. at 10 (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). On March 23, 2007, the Court denied the petition in *Banda-Ortiz*.

In opposing certiorari in this case, the Government's principal objection was that the Fifth Circuit's opinion is unpublished and that, if this Court were to agree with the Government's proposal for the Court to order the Fifth Circuit to vacate its decision in *Banda-Ortiz* as moot, there would have been a "possibility that the Fifth Circuit ultimately could adopt a view different" from that in *Banda-Ortiz*. *Moorani* Opp. at 18. That objection was meritless before the Court's denial of certiorari in *Banda-Ortiz* because the Fifth Circuit's position on the question presented here is abundantly clear: The Fifth Circuit's panel issued a lengthy published decision in *Banda-Ortiz* and, after a full briefing for *en banc* review, the Fifth Circuit denied *en banc* review over five dissents. *Moorani* Reply at 4. Moreover, petitioner in this case filed a motion for rehearing *en banc* in the Fifth Circuit that was also denied following the denial of *en banc* review in *Banda-Ortiz*.

Now that this Court has denied certiorari in *Banda-Ortiz*, this objection has effectively been voided; the Fifth Circuit's decision in *Banda-Ortiz* remains the law of that Circuit and there can be no question of its continuing validity. Thus, any doubts that the Government raised as to the worthiness of this case for certiorari based on the possibility that *Banda-Ortiz* would be vacated have now been eliminated. Because the Court left in place the Fifth Circuit's decision in *Banda-Ortiz*, there is also no question about the wide-ranging split of authority on the question presented: The Fifth Circuit is firmly aligned with the Fourth Circuit, holding that a motion to reopen that is not resolved during the voluntary departure period is forfeited, while the Third, Eighth, Ninth, and Eleventh Circuits hold that the filing of a motion to reopen during a previously-established voluntary departure period tolls that period until the motion to reopen is resolved; and the Seventh Circuit has ruled that, where such a motion to reopen is granted by the BIA, the underlying departure order is rendered void. *Moorani* Reply at 2-5.

Accordingly, for this reason and the reasons set forth in the Petition for Certiorari and Reply Brief, the Court should grant the petition for certiorari in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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